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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~907~~

PIONEER MOTOR SERVICE, INC.,

Petitioner

v.

PIONEER TRANSFER & WAREHOUSE CO., a corporation, JAMES A. GIBBONS and RICHARD WILLIAM MEER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

IN THE MATTER OF

PIONEER MOTOR SERVICE, INC.,

Alleged Bankrupt

PIONEER MOTOR SERVICE, INC.,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Pioneer Motor Service, Inc., the alleged bankrupt, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Seventh Circuit, in the above cause.

(a)

OPINION

The opinion of the United States Court of Appeals, Seventh Circuit, has not yet been published. The opinion is set out in full along with the opinion of the United States District Court and the opinion of the referee in bankruptcy in an appendix attached to this petition.

(b)

JURISDICTION

The jurisdiction of this court is invoked pursuant to Rule 23 on the following grounds:

(i) The judgment of the Court of Appeals was handed down October 8, 1968.

(ii) Petition for Rehearing was denied by the Court of Appeals on November 12, 1968.

(iii) The letter and the spirit of the Bankruptcy Act were violated because none of the petitioning creditors was a *bona fide* creditor.

(2) The person who initiated the bankruptcy, Julius Gottlieb, on behalf of Pioneer Transfer and Warehouse Co. against the alleged bankrupt, Pioneer Motor Service, Inc., owned by his brother, John Gottlieb, consented to the bankruptcy on behalf of the latter without authority and with intent to defraud the latter. The entire bankruptcy proceeding was admittedly conceived in fraud but was condoned by the Court of Appeals and the Dis-

trict Court as a *fait accompli* or "an ugly family dispute." (See Court of Appeals Opinion)

(3) There is not a single case cited or one which can be found which sustains this patent fraud.

(4) This Court has never permitted the Bankruptcy Act to be used as an instrument of fraud merely because the fraud is committed by one brother against another brother.

(5) The decision of the Court of Appeals is contrary to the established law on fraud, estoppel, and the purpose of the Bankruptcy Act as interpreted by this Court and other Courts of Appeal.

(6) This Court has before it for the first time the question whether the Bankruptcy Act permits a trusted employe and brother to defraud his employer and brother, by filing a petition in bankruptcy against the employer and then fraudulently consenting to the bankruptcy on behalf of the alleged bankrupt.

(c)

QUESTIONS PRESENTED FOR REVIEW

1. Will a Bankruptcy Court permit a petitioning creditor corporation owned by one brother to admit in writing on behalf of the alleged bankrupt corporation that the latter is willing to be declared a bankrupt without the authority or knowledge of the other brother who owns the alleged bankrupt corporation, or the Board of Directors of the latter corporation?

2. Where none of the three petitioning creditors is a *bona fide* creditor at the time of the filing of the petition, will this Court sustain or dismiss such a petition?

3. Where the alleged bankrupt has offered to pay off every *bona fide* creditor in full, should the bankruptcy petition be dismissed?

4. Where the bankruptcy action is conceived in fraud by one brother to cheat and defraud his other brother should the petition be sustained as a *fait accompli* or should the court dismiss such petition?

(d)

No special constitutional or statutory provisions, except the Bankruptcy Act, are involved.

(e)

STATEMENT OF THE CASE

An involuntary petition of bankruptcy was filed by Pioneer Transfer and Warehouse Co., an Illinois corporation (hereinafter called "Transfer"), whose President and sole stockholder was Julius Gottlieb, against Pioneer Motor Service, Inc., an Illinois corporation, (hereinafter called "Motor"), whose Vice President and operating head was the same Julius Gottlieb. The controlling and substantially sole stockholder of Motor is John O. Gottlieb, Julius Gottlieb's brother. Two other alleged creditors who joined in the bankruptcy petition were two employees of Motor who claimed they had vacation pay due them, but which was not due at the time of the filing of the petition.

Julius Gottlieb signed the petition in bankruptcy on behalf of Transfer, and he also signed a consent to be declared a bankrupt on behalf of Motor, admittedly without the consent or knowledge of his brother, John O. Gottlieb, or any of the Directors of Motor.

Motor filed an answer denying the alleged acts of bankruptcy and charged that Julius Gottlieb filed the Bankruptcy petition fraudulently and in breach of trust in order to secure for himself the Certificate of Convenience and Necessity owned by Motor.

The matter was referred to the Referee in Bankruptcy to hold a hearing and at the hearing John O. Gottlieb, on behalf of himself and Motor, offered to pay up all outstanding *bona fide* debts due from Motor to any and all *bona fide* creditors and to dismiss the petition. The Referee rendered an opinion and entered an order adjudicating Motor a bankrupt and making some comments on the propriety of Julius Gottlieb's action.

A petition for review was duly filed to the District Court. Judge Mercer of the District Court died and there was a two year delay until Judge Morgan was appointed to succeed him. Judge Morgan then entered an order sustaining the Referee. The opinions of the Referee and Judge Morgan respectively are attached to this petition as appendices.

An appeal was taken to the United States Court of Appeals, Seventh Circuit, and the order of the District Court was affirmed. Petition for rehearing was duly filed and the petition for rehearing was denied on November 12, 1968.

The record in this case discloses that the entire bankruptcy proceeding was unnecessary, improper and a

fraud upon the alleged bankrupt and its principal stockholder, John O. Gottlieb.

Both the lower court and the Court of Appeals excused the fraud that admittedly was committed by calling the proceeding "an ugly family dispute."

The words of the Court of Appeals in its opinion states our position and even states further that John O. Gottlieb is ready, willing and able to pay off all *bona fide* creditors. The opinion states *inter alia*:

> "What then gives rise to this present controversy? It would appear to be an ugly family dispute between two brothers. It apparently was brought into focus when the sale of bankrupt's certificate of convenience and necessity brought some $200,000 into the bankrupt's estate. John disputes the claim of Transfer (Julius) and resulting litigation is now pending undetermined in the state courts. Julius is now dead. John is willing to pay the creditors, except Julius, if the court will dismiss the bankruptcy proceeding and rescind the sale of Motor's certificate and thereby avoid the payment of fees, expenses and costs out of bankruptcy funds now on hand."

The issue before this court is whether fraud can be condoned because it is between one brother against another brother, and whether the Bankruptcy Act can be used as an instrument of fraud.

Examination of the record reveals the fraud but it is condoned for the reasons set forth in the opinion of the Court of Appeals quoted above.

This petition is filed to ask this Court to review the judgment of the U. S. Court of Appeals which judgment is contrary to basic bankruptcy law as interpreted by this Court and other U. S. Courts of Appeal.

(f)

Not applicable to judgments of Federal Courts.

(g)

This Court and all lower federal courts have exclusive jurisdiction of bankruptcy matters under the Constitution and under the Bankruptcy Act.

(h)

REASONS WHY THE WRIT FOR CERTIORARI SHOULD BE ALLOWED

The decision of the United States Court of Appeals establishes a dangerous precedent and is contrary to basic principles as established by this Court and other United States Courts of Appeal.

Fraud and collusion by one brother to file a petition in bankruptcy against his brother's corporation and then consenting to the bankruptcy while purporting to act for the debtor corporation cannot be tolerated under the Bankruptcy Act.

This Court cannot sanction fraud merely because the fraud is a *fait accompli.*

This Court cannot permit the same person to act for the creditor and debtor on the same proceeding.

This Court cannot condone fraud merely because one brother defrauds another brother, and even though the Court of Appeals condones the fraud as "an ugly family dispute between two brothers." (Opinion of U. S. Court of Appeals)

This Court cannot condone fraud and abuse of the Bankruptcy Act even though the Court of Appeals says, "We have no desire to referee this family dispute."

This Court should clarify the law as to when an alleged creditor is estopped from acting for the alleged bankrupt in the same action, particularly where the debtor offers to pay all bona fide creditors in full and

the bankruptcy petition was initiated with fraudulent intent and for a fraudulent purpose.

This Court has before it for the first time the novel question as to whether the same person can be creditor and debtor and whether the same person can file the involuntary petition and at the same time consent to an adjudicating on behalf of the alleged bankrupt.

The Court of Appeals has permitted this contrary to the established law and has departed from the applicable decisions.

CONCLUSION

For the reasons hereinabove assigned, it is earnestly urged that this petition for a writ of certiorari be granted.

Respectfully submitted

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Alleged Bankrupt.

APPENDIX I

Opinion of United States Court of Appeals, Seventh Circuit

SEPTEMBER TERM AND SESSION, 1968

No. 16605
In the Matter of

PIONEER MOTOR SERVICE, INC.,
Alleged Bankrupt.

PIONEER MOTOR SERVICE, INC.,
Appellant.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.

October 8, 1968

Before CASTLE, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and HASTINGS, *Circuit Judge.*

HASTINGS, *Circuit Judge.* On October 6, 1967, the district court[1] entered an order sustaining the referee in bankruptcy[2] on two certificates of review of decisions by the referee filed December 10, 1964 and March 4, 1965, respectively. This appeal is from such order of affirmance by the district court.

The December 10, 1964 certificate concerned an adjudication of Pioneer Motor Service, Inc., (Motor) a corporation, to be an involuntary bankrupt. The March 4, 1965 certificate related to an order by the referee denying a continuance of the sale of bankrupt's certificate of necessity and convenience.

We have reviewed the record in this matter, including the thorough and studied memorandum decisions and

[1] United States District Court for the Southern District of Illinois, Northern Division (Rock Island, Illinois), the Honorable Robert D. Morgan, presiding.

[2] Honorable Stephen J. Covey, Referee in Bankruptcy.

orders of the referee and the district court. We shall briefly state the subject matter giving rise to the issues raised.

The petition for adjudication was filed by three creditors of Motor, viz: Pioneer Transfer & Warehouse Co., (Transfer), a corporation, and two employees of Motor. Julius Gottlieb, president and majority stockholder of Transfer, executed the petition on behalf of Transfer. The two employees held claims for unpaid vacation pay. Herriott Trucking Company, Inc., a corporation, intervened as a petitioning creditor with the foregoing.

Motor was engaged in the freight business in Rock Island, Illinois, principally in carrying freight to the Chicago area. Its sole stockholder was John O. Gottlieb, of Beverly Hills, California, a brother of Julius. Julius resided in Moline, Illinois, and had managed and operated Motor for his brother for more than 20 years as its executive vice-president. Motor was the owner of an Illinois Certificate of Public Convenience and Necessity.

Transfer was engaged primarily in hauling local freight in the Rock Island area and renting tracts of real estate it owned. Julius was president and majority stockholder. It owned the building from which Motor conducted its freight business and leased to Motor the trucks it used in the operation of its business. Transfer had advanced (loaned) Motor more than $118,000 in operating funds to keep Motor's business active and had substantial claims for rent of its building to Motor ($48,000) and for rental of its trucks for use of Motor ($33,000).

Following a series of contested hearings on the adjudication petition and objections thereto by Motor, the referee found and determined that Motor was insolvent. As of July 25, 1964, its assets were fairly evaluated at $21,329 and its liabilities were approximately $263,000. Its only tangible asset was some worn out unusable junk trucks. Its intangible assets were insurance deposits, accounts receivable, prepad truck licenses and petty cash.

No evidence was introduced by any party showing the value of Motor's Illinois certificate, none appeared on Motor's books, and its value, if any, was not included in its list of assets.

On July 25, 1964, the United States of America, Internal Revenue Service, recorded a tax lien in the re-

corder's office, Rock Island County, Illinois, for highway use tax in the amount of $3,251.45. On July 30, 1964, IRS levied upon Motor's bank account, and on August 4, 1964, IRS collected $797.45 from Motor's account.

Our examination of the record compels the conclusion that there is more than sufficient evidence to support the determination that Motor was insolvent on July 25, 1964 and that this condition continued through the filing of the adjudication petition on August 10, 1964 and the referee's final order of adjudication filed November 18, 1964. The referee did not err in so finding.

We need not consider the several claimed acts of bankruptcy asserted by petitioning creditors which were disallowed by the referee. We shall examine the one act of bankruptcy found valid by the referee.

Section 3 of the Bankruptcy Act, 11 U.S.C.A. § 21(a)(3) provides:

> "§ 21. Acts of bankruptcy (a) Acts of bankruptcy by a person shall consist of his having * * * (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings or *distraint* and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property; * * *." (Emphasis added.)

It is undisputed that the Internal Revenue Service, having filed its lien on July 25, 1964, did levy on Motor's bank account on July 30, 1964 and collected approximately $800 on August 4, 1964 as a result of such seizure of Motor's property. It is further undisputed that Motor did not vacate or discharge such lien five days prior to the disposition of the bank account.

It is clear from the Bankruptcy Act quoted above that a lien *obtained through distraint* is an act of bankruptcy. It has been held that a seizure of property to enforce a lien, under the Internal Revenue Code, is a distraint within the meaning of the Act. Collier, Bankruptcy, 14th Ed., Vol. 1, § 3.308[6], pp. 470-471; In Re: Timberline Lodge, D.C. Ore., 139 F. Supp. 13, 15-17 (1955).

As *Timberline, supra* at 17, aptly quotes from Collier, *supra* at 471: "It is not the lien itself, nor the execution

thereunder, which constitutes the act of bankruptcy. It is rather the failure on the part of the debtor to have the same vacated or discharged (1) at least five days before the date set for [the] sale or other disposition of the property, or (2) within thirty days after the creation of the lien."

We conclude, therefore, that the referee did not err in so finding this to be an act of bankruptcy within the purview of the Act.

What then gives rise to this present controversy? It would appear to be an ugly family dispute between two brothers. It apparently was brought into focus when the sale of bankrupt's certificate of convenience and necessity brought some $200,000 into the bankrupt's estate. John disputes the claim of Transfer (Julius) and resulting litigation is now pending undetermined in the state courts. Julius is now dead. John is willing to pay the creditors, except Julius, if the court will dismiss the bankruptcy proceeding and rescind the sale of Motor's certificate and thereby avoid the payment of fees, expenses and costs out of bankruptcy funds now on hand.

We have no desire to referee this family dispute. It is sufficient to say that under the record and applicable law there is ample support for the decisions of the referee under review and that the district court did not err in so holding. We have examined Motor's numerous other assertions of error and are not persuaded.

In passing, we observe that the delay in determining the certificates of review was occasioned by the untimely death of the late Judge Frederick O. Mereer and the resulting time required to fill the vacancy in his office.

For the foregoing reasons, we affirm the decision and order of the district court which is the subject of this appeal.

Affirmed.

APPENDIX II

Opinion of United States District Court, filed October 6, 1967

DECISION AND ORDER
ON CERTIFICATES OF REVIEW

This matter, involving an involuntary bankruptcy proceeding, is before the Court on Certificates of Review of decisions by the Referee in Bankruptcy which were filed December 10, 1964, and March 4, 1965, respectively. The alleged bankrupt and its sole stockholder vigorously contend that the Referee was in error in finding an act of bankruptcy and in making the adjudication based thereon. Having carefully considered the record before it, and all the arguments and briefs of counsel, the Court is of the opinion that the Referee's decisions were correct.

It would serve no useful purpose to repeat or expand upon the thoughtful and lucid decisions in writing handed down by the Referee and on file herein. They are believed sound in every respect.

It is apparent that in 1967 the question of the propriety of the Referee's refusal to continue a scheduled sale for thirty days in 1965 is moot. Extraneous circumstances provided a great deal more delay than was sought, but it must be observed that no realization of the values claimed for delay is apparent.

The objections to the basic adjudication are:

1. That for reasons of his own, the now deceased longtime executive officer and operating head of the bankrupt corporation, who was a brother of the sole stockholder thereof and who also was principal owner

of a substantial corporate claimant in the bankruptcy proceeding, did not take available steps which would have avoided acts of bankruptcy;

2. That the sole stockholder of the bankrupt corporation has been and is now willing to pay all "bona fide" creditors, if that would foreclose the bankruptcy (but apparently not otherwise), and this offer does not include payment of the claim of his brother's company;

3. That litigation pending between the two brothers and their respective companies in the Circuit Court of Rock Island County, Illinois, is the proper vehicle for determining their respective rights against each other.

The Court does not believe that these matters have any important bearing on the decisions here under review. These contentions all ignore the rights of the other creditors to the statutory remedy of involuntary bankruptcy proceedings, which have been properly initiated as the Referee found. It is noted with interest, that while much is made of a willingness by the sole stockholder of the bankrupt corporation to pay certain creditors, no such payment has been made during the two and one-half years this matter awaited review. Permission of the court is hardly necessary to the satisfaction of debts one wishes to see paid, whether there is a legal obligation to pay them or not. Neither does the family dispute involved in the state court suit preclude this bankruptcy proceeding as a matter of law.

Accordingly, the Referee is hereby sustained on both Certificates of Review.

/s/ Robert D. Morgan
United States District Judge

Dated: Oct. 6, 1967

APPENDIX III

Opinion and Order of Referee in Bankruptcy, filed November 18, 1964

This matter comes on to be heard, after due notice to all interested parties, upon the petition of Pioneer Transfer & Warehouse Co., a corporation, James A. Gibbons, Richard William Neer and the intervening petition of Herriott Trucking Company, Inc. asking that Pioneer Motor Service, Inc. be adjudged a bankrupt, and upon the answer to said petitions filed by the Alleged bankrupt; and this Court having now heard the testimony of the witnesses; having examined the documentary evidence; and having heard the arguments of counsel; and being fully advised in the premises, Finds, as follows:

STATEMENT OF FACT

Pioneer Motor Service, Inc., a corporation, the Alleged Bankrupt, hereinafter called Pioneer Motor, is engaged in the freight business in Rock Island, Illinois. Its business consists primarily of carrying freight between the Rock Island area and the Chcago area. The sole stockholder of Pioneer Motor is John O. Gottlieb, of Beverly Hills, California. The company has been managed and operated for the last twenty years by its executive vice-president, Julius Gottlieb, the brother of John, who resides in Moline, Illinois.

Pioneer Transfer & Warehouse Co., one of the petitioning creditors, hereinafter referred to as Pioneer Transfer, is a corporation with offices at 305 44th Street, Rock Island, Illinois. Its business consists primarily of hauling

local freight in the Rock Island area and renting tracts of real estate, which it owns. Julius Gottlieb is the president and majority stockholder of Pioneer Transfer. Pioneer Transfer owns the building from which Pioneer Motor conducts its freight business, and in addition leases to Pioneer Motor the trucks it uses in the operation of its business.

On July 25, 1964, and at all times thereafter Pioneer Motor was insolvent in that the aggregate value of its property at a fair valuation was not sufficient in amount to pay its debts. From and after July 25, 1964, its liabilities were approximately $263,903.75, and its assets at a fair valuation totalled not more than $21,329.20. These assets consist entirely of intangible property such as insurance deposits, accounts receivable, prepaid truck licenses and petty cash. The only tangible assets of Pioneer Motor are some worn out unusable junk trucks. These trucks have not been used for more than five years and have been completely stripped down. On the books of the company they are carried as a nominal asset, having a value of $5.34. Actually these trucks are completely valueless as a business asset. Pioneer Motor also owns an Illinois Certificate of Public Convenience and Necessity. No evidence was introduced showing the value of this Certificate and it is not given any value on the books of Pioneer Motor. Therefore, the value, if any, of this Certificate is not included in the total value of the assets of Pioneer Motor stated above.

The only other possible asset of Pioneer Motor is an alleged debt due from John O. Gottlieb in the amount of $40,095.82. The statute of limitations, however, has run on this debt and there is also a material dispute as to whether John O. Gottlieb is actually liable. This al-

leged asset is too uncertain and speculative to be given any value and it also is not included in the total value of assets stated above.

On July 25, 1964, and at all times thereafter, Pioneer Motor was indebted to Pioneer Transfer in the amount of $210,107.18. This obligation arose, as follows:

Loans from Pioneer Transfer to Pioneer Motor	$118,839.91
Real estate rent for use of Pioneer Transfer building	48,190.00
Rent for use of Pioneer Transfer trucks	32,950.00
Interest	10,127.27

Also on the 25th of July 1964, and at all times thereafter, Pioneer Motor was indebted to Herriott Trucking Company, Inc. in the amount of $11,005.28 for use of Herriott's building and dock facilities in Chicago. Also on September 1, 1964, Pioneer Motor was indebted to Richard William Neer, an employee, for the sum of $420.00 for unpaid vacation pay.

The debts due from Pioneer Motor to Pioneer Transfer, Herriott Trucking Company, Inc. and Richard William Neer are liquidated, unsecured, provable claims and not contingent as to liability.

On July 25, 1964, the United States of America, Internal Revenue Service, recorded a tax lien in the recorder's office, Rock Island County Illinois, for highway use tax in the amount of $3,251.45. On July 30, the Internal Revenue Service levied upon the bank account of Pioneer Motor and on August 4, 1964, as a result of said levy, the Internal Revenue Service collected $797.45 from the account of Pioneer Motor.

On the 15th day of January 1964, the State of Illinois recovered four judgments against Pioneer Motor because

of overweight charges in the following amounts: $92.80, $187.20, $36.00 and $81.60. On August 13, 1964, the Clerk of the Circuit Court of Rock Island County issued four executions based upon said judgments and delivered them to the Sheriff of Rock Island County. On the 14th day of August 1964, said executions were served on Pioneer Motor. Said judgments have never been paid.

On August 5, 1964, Julius Gottlieb, manager and vice-president of Pioneer Motor stated in a letter to Irving Goodman, an attorney in Chicago, Illinois, that the Internal Revenue Department had placed a lien upon the assets of Pioneer Motor, that Pioneer Motor was unable to meet its financial obligations and that Pioneer Motor was willing to be adjudged a bankrupt. Julius Gottlieb was not authorized by the Board of Directors of Pioneer Motor to write such a letter or to make such admissions.

On August 10, 1964, the involuntary petition in bankruptcy was filed herein by Pioneer Transfer & Warehouse Co., Richard William Neer and James A. Gibbons. On August 25, 1964, Pioneer Motor filed its answer to the involuntary petition and denied that it should be adjudged a bankrupt. On September 21, Herriott Trucking Company, Inc. intervened as a creditor in said involuntary petition, pursuant to Section 59 f of the Bankruptcy Act. Also on September 21, the original involuntary petition in bankruptcy was amended by adding as an act of bankruptcy the liens on the property of Pioneer Motor created by the four executions issued on the judgments of the State of Illinois.

OPINION

The four petitioning creditors bring this action under Sections 59 and 3 of the Bankruptcy Act. The material portions of these Sections are, as follows:

> "Section 59. Who may file and dismiss petitions. * * *
>
> "b. Three or more creditors who have provable claims not contingent as to liability against a person, amounting in the aggregate to $500 in excess of the value of any securities held by them, * * * may file a petition to have him adjudged a bankrupt; * * *."
>
> "Section 3. Acts of Bankruptcy. a. Acts of bankruptcy by a person shall consist of his having * * * (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings or distraint and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property; or * * * (6) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt.
>
> "b. A petition may be filed against a person within four months after the commission of an act of bankruptcy. * * *."

In the instant case there is no doubt but what Pioneer Transfer & Warehouse Co., Herriott Trucking Company, Inc., and Richard William Neer have provable unsecured claims against Pioneer Motor of more than $500.00, and the main issue to be decided is whether Pioneer Motor has committed an act of bankruptcy under Section 3 of the Bankruptcy Act. The pleadings and proof indicate that there are three possible acts of bankruptcy, two of which come under paragraph 3, and one under paragraph 6 of Section 3.

The petitioners first contend that Pioneer Motor committed an act of bankruptcy when while insolvent it allowed the State of Illinois to obtain a lien against its property by way of execution and then failed to discharge this lien within thirty days. The second contention is that Pioneer Motor committed an act of bankruptcy when while insolvent it allowed the Internal Revenue Service to levy upon and distrain its bank account. Finally it is argued that Pioneer Motor committed an act of bankruptcy when Julius Gottlieb, its vice-president, admitted in writing that Pioneer Motor could not pay its debts and was willing to be adjudged a bankrupt.

The first issue to be determined, therefore, is whether Pioneer Motor was insolvent at the time the alleged liens were obtained against its property. If there was no insolvency, then there can be no possible act of bankruptcy under paragraph 3 of Section 3 of the Bankruptcy Act. The evidence of insolvency consists primarily of a balance sheet prepared by Abraham Baker, the accountant for Pioneer Motor, from the voluminous books and records of Pioneer Motor. This balance sheet, which shows overwhelming insolvency on August 31, 1964, was introduced into evidence without objection. This balance sheet was actually a summary of the voluminous books and records of Pioneer Motor and was introduced in evidence in their stead. It is proper to allow into evidence a summary of voluminous books and records. See *Sam Macri & Sons, Inc.* v. *U.S.A.*, 313 Fed. 2d 119, C.A. 9th.

Other testimony proved that there was no substantial change in the financial condition of Pioneer Motor during the month of August 1964, and that no financial disaster hit the company during that month. It is, therefore,

proper to infer from these facts that the bankrupt was insolvent on July 25, 1964, and at all material times thereafter. Where overwhelming insolvency is shown on a particular date, it is proper to infer that the same condition existed a short time prior thereto. *In re Great Western Biscuit,* 85 Fed. Supp. 314; *In re Dix,* 267 Fed. 1016; *Williams* v. *Platner,* 46 Fed. 2d 467; *Brown Shoe* v. *Carns,* 65 Fed. 2d 294; *Saper* v. *First National Bank of GlenCove,* 47 Fed. 2d 343; *Irving Trust Co.* v. *Roth,* 48 Fed. 2d 345; and *Mutual Savings and Loan Association* v. *McCants,* 183 Fed. 2d 423.

Pioneer Motor in its defense introduced testimony tending to show that its books and records were incorrect and had not been properly maintained. Much of this evidence is unintelligible and immaterial. Both the bookkeeper and accountant of Pioneer Motor testified that the books and records were kept in a businesslike manner and were correct. There is no convincing evidence in the record to show that their testimony is wrong.

The next question is whether any liens were obtained against the property of Pioneer Motor by legal proceedings or distraint during the period of insolvency. The petitioners contend that liens were obtained by the State of Illinois when it had executions issued on its judgments. However, under Illinois law an execution only becomes a lien upon the tangible property of the judgment debtor, and in the instant case Pioneer Motor had no tangible property to which a lien could attach. See Chapter 77 of Illinois Revised Statutes, Sec. 10; and *Crawford* v. *Schmitz,* 139 Ill. 564; where the Court said on page 569, as follows:

> "By our statutes, executions, whether issued from a court of record or by a justice of the peace, run against the goods and chattels of the judgment

> debtor, and these words are held to include only tangible property which may be seized and which may be present at the sale. A chose in action, on the other hand, is a personal right or thing not reduced to possession, but recoverable in an action, and which can not be enforced against a reluctant party without suit."

The only assets of Pioneer Motor during the last week of July and the month of August 1964, were intangible assets, such as accounts receivable, insurance deposits, bank accounts, certificates and licenses. The only possible tangible asset would be the old unusable junk trucks, which had a nominal value on the books of $5.34. From the testimony it is evident that this junk property had no actual value and, therefore, it is not "property" within the meaning of Section 3 of the Bankruptcy Act. It would be a complete miscarriage of justice to find that an act of bankruptcy had been committed because a lien had been obtained against worthless tangible property. The purpose of Section 3 of the Bankruptcy Act is to prevent one creditor from getting a lien upon the valuable property of a bankrupt to the exclusion of all other creditors. It was not intended to apply where the property involved is valueless. Property, within the meaning of Section 3 of the Bankruptcy Act, must be held to be property which has a value, and which could be reduced to cash for the benefit of creditors. See *Gleason* v. *Thaw,* 236 U.S. 558, where the Court said on pages 560-561, as follows:

> " " * * * That the word 'property' is nomen generalissimum, as asserted by the petitioner, is not to be denied, but no more is it to be denied that its meaning may be restricted, not only by the application of the maxim, noscitur a sociis, but by the purpose for which it is used, or by its evident use as a word

> of art, or by its use in a technical sense. The very generality of the word requires restriction. * * *'
> "The accurate delimitation of the concept property would afford a theme especially apposite for amplificative philosophic disquisition; but the Bankrupt Law is a prosy thing intended for ready application to the everyday affairs of practical business, and when construing its terms we are constrained by their usual acceptation in that field of endeavor. The word property, without restriction, occurs more than seventy times in the Act. * * *."
> "* * * At most it denotes something subject to ownership, transfer or exclusive possession and enjoyment, which may be brought within the dominion and control of a court through some recognized process. * * *."

In the instant case the alleged property in question is valueless and worthless and consequently incapable of being reached by process or brought into Court. Therefore, no lien was obtained on the property of Pioneer Motor and no act of bankruptcy committed when the State of Illinois had executions issued on its four judgments.

The next question is whether the Internal Revenue Service obtained a lien by judicial proceedings when it filed its notice of lien in Rock Island County on July 25, 1964. This also must be answered in the negative. Liens obtained through proceedings to enforce tax or other statutory liens are not liens obtained through legal proceedings within the meaning of Section 3 of the Bankruptcy Act. *Garrison* v. *Johnson,* 66 Fed. 2d 227; *In re Timberline Lodge, Inc.,* 139 Fed. Supp. 13 and *U. S.* v. *Schroeder,* 204 Fed. Supp. 199.

The next question, and this is the most serious one, is whether the Internal Revenue Service obtained a lien

by distraint against the property of Pioneer Motor when it levied on its bank account on July 30, 1964. A seizure of property to enforce a lien under the Internal Revenue Code has been held to be a distraint within the meaning of Section 3 of the Bankruptcy Act. See Collier on Bankruptcy Vol. I, page 471 and *In Re Timberline Lodge, Inc.*, 139 Fed. Supp. 13. The money in the bank account was actually paid to the Internal Revenue Service on August 4, 1964, and since the lien had not been vacated or discharged five days prior to this disposition of the account, an act of bankruptcy was committed by Pioneer Motor.

Section 3 of the Bankruptcy Act provides that an act of bankruptcy has been committed when a lien obtained by distraint is not vacated or discharged five days before the date set for sale or disposition. Where a bank account is the property seized there is, of course, no need for a further sale or disposition and, therefore, in the instant case no definite date was set for a sale or disposition. It could be argued that because there was no definite date set, that, therefore, Pioneer Motor had no opportunity to vacate or discharge the lien five days before sale or disposition and that consequently no act of bankruptcy had been committed. This argument, however, is too technical and must be rejected. The purpose of the Bankruptcy Act is to allow creditors to file an involuntary petition, if the property of a debtor is seized and disposed of under a valid lien. That is exactly what happened in the instant case and the intent of the Act should not be defeated just because the nature of the property seized did not necessitate a formal sale or disposition. Several cases have held that a seizure of a chose in action, as in the instant case, is an act of bankruptcy, even though there is no five day period before sale or

disposition. See *In re Harper,* 105 Fed. 900; *In re Miller,* 104 Fed. 764; *In re Fineman,* 223 Fed. 652.

The final act of bankruptcy alleged by the petitioning creditors is that the executive vice-president of Pioneer Motor, Julius Gottlieb, admitted in writing that the company could not meet its financial obligations and was agreeable to being adjudged a bankrupt. This was done without express authority from the stockholders or board of directors of Pioneer Motor. It is clear that an officer of a company has no power to make such a statement in writing without first receiving authority from either the stockholders or directors. See *Arkansas Oil & Mining Co.* v. *Murray Tool & Supply Co.,* 127 Fed. 2d 564, where the Court said on page 567, as follows:

> "* * * But there is another fatal objection to this written admission. It does not appear to have been authorized either by the Board of Directors or by the stockholders. Such an admission can be made only by some corporate act, and an admission by an officer, whose power to bind the corporation by such admission is not shown, is insufficient."

See also *In re Community Book Co., Inc.,* 10 Fed. 2d 617; *In re Southern Steel Co.,* 169 Fed. 702.

Under Illinois law neither a president nor a vice-president of a corporation has any implied authority to perform acts on behalf of the corporation, which are unusual or extraordinary and not in the ordinary course of business. See *Smith* v. *Shoreline Printers & Publishers, Inc.,* 6 Ill. App. 290; and *Sacks* v. *Helene Curtis Industries, Inc.,* 340 Ill. App. 76. See also Fletcher Cyclopedia Corporation Vol. 2, Sec. 617, p. 756-759.

Under the Illinois Business Corporation Act the business affairs of a corporation are managed by a board

of directors and neither a sale or disposition of substantially all of the property and assets of a corporation, nor its voluntary dissolution can be accomplished without express authorization of the directors and shareholders. Illinois Revised Statutes, Chap. 32, Sections 157.33, 157.72 and 157.76.

Pioneer Motor contends that the involuntary petition should be dismissed because of the bad motives of Julius Gottlieb. It is contended that the only purpose in filing the involuntary petition was to force a sale of the Certificate of Public Convenience and Necessity. The motive of the involuntary petitioners has been held in many cases to be immaterial. The only material concern of the Bankruptcy Court is whether the requirements of the statute have been met, and the reasons or motives which inspired or instigated the proceedings are of no importance and will not defeat an adjudication. See Collier on Bankruptcy Vol. III, page 671; *Matter of National Motorship,* 7 Fed. Supp. 1001; *Guterman* v. *Parker & Co.,* 86 Fed. 2d 546; and *In re Automatic Typewriter,* 271 Fed. 1.

Pioneer Motor also contends that Pioneer Transfer is estopped from acting as a petitioning creditor because its President, Julius Gottlieb is also the executive vice-president and manager of the alleged bankrupt. This, however, does not create an estoppel. An estoppel is only created where a petitioning creditor has consented to, participated in, or secured the commission of any of the acts of bankruptcy. Collier on Bankruptcy Vol. III, page 681; *Matter of Taylor House Association,* 209 Fed. 924; *Matter of Maryanov & Maryanov,* 20 Fed. 2d 939; and *Dinerman* v. *Bowley & Travers, Inc.,* 301 Fed. 2d 464.

In the instant case there is no evidence that Julius Gottlieb had anything to do with the seizure by the Internal Revenue Service of the bank account of Pioneer Motor. This lien was obtained purely on the initiative of the Internal Revenue Service and Julius Gottlieb in no way consented to or participated in the securing of the lien.

It is true that Julius Gottlieb did participate in the alleged act of bankruptcy whereby he admitted the willingness of Pioneer Motor to be adjudged a bankrupt. However, this act of bankruptcy is invalid for other reasons and it has been held that where there is more than one act of bankruptcy, the fact that one of the petitioning creditors participated in one of the acts does not bar the Court from proceeding on the other. See *In re Thomas,* 211 Fed. Supp. 187.

It Is, Therefore, Ordered, Adjudged and Decreed that Pioneer Motor Service, Inc. is adjudged a bankrupt.

It Is Further Ordered, Adjudged and Decreed that it shall on or before the 9th day of December 1964, file in Room 333, U. S. Post Office Building, Peoria, Illinois, its Statement of Affairs and a Schedule of its assets and liabilities.

Entered November 18th, 1964.

Referee In Bankruptcy

/s/ Stephen J. Covey

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In The

Supreme Court of the United States

October Term, 1968

No. 907

PIONEER MOTOR SERVICE, INC.,

Petitioner,

vs.

PIONEER TRANSFER & WAREHOUSE CO., a corporation, JAMES A. GIBBONS and RICHARD WILLIAM MEER,

Respondents.

Answer To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit On Behalf Of Respondents Pioneer Transfer & Warehouse Co. and Herriott Trucking Company

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Answer To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit On Behalf Of Respondents Pioneer Transfer & Warehouse Co. and Herriott Trucking Company

To: *The Honorable Chief Justice And The Associate Justices Of The Supreme Court Of The United States*:

Pioneer Transfer & Warehouse Co. and Herriott Trucking Company, Inc., two of the petitioning creditors in the petition filed to adjudicate the Pioneer Motor Service, Inc. as an involuntary bankrupt, resist the issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals, Seventh Circuit.

STATEMENT OF CASE.

We wish to correct some of the statements of the facts made by petitioner in its brief.

Petitioner states that the vacation pay due the employees of Motor was not due to them at the time of the filing of the petition. The Court of Appeals found otherwise. We refer this Court to Page 2A of Appendix I, Petitioner's Brief. Furthermore, we wish to point out to this Honorable Court that the statement of the case leaves out the essential ground for adjudication of bankruptcy. In the opinion of the Court of Appeals, page 3A of Appendix I, it is stated, "It is undisputed that the Internal Revenue Service having filed its lien on July 25, 1964 did levy on Motor's bank account on July 30, 1964 and collected approximately $800.00 on August 4, 1964 as a result of such seizure of Motor's property. It is further undisputed that Motor did not vacate or discharge such lien five days prior to the disposition of the bank account."

We would also like to point out that the statement of facts fails to mention that Motor was insolvent at the time that this lien was filed on July 25, 1964. Again we refer this Honorable Court to page 3A, Appendix I of Petitioner's Brief.

ARGUMENT.

(a)

THERE IS NO NEED HERE FOR A WRIT OF CERTIORARI.

Rule 19 of the Supreme Court Rules provides that a Writ of Certiorari will be granted only where there are special and important reasons therefore. Such grounds for the issuance of a Writ of Certiorari are not present in the within matter. The opinion rendered by the United States Court of Appeals, Seventh Circuit, clearly indicates that the instant matter was decided in accordance with the provisions of the Bankruptcy Act and the case law interpreting that act. (Appendix I of Petition for Writ of Certiorari, Pages 1A through 4A)

No new point of law was raised or decided in the instant matter, no conflicting bankruptcy rule was rendered, and no departure was made from the established law of bankruptcy. (See Rule 19 of the Rules of the Supreme Court Subsection b). Petitioner attempts to persuade the Court to take jurisdiction because one of the petitioning creditors in the involuntary bankruptcy petition was controlled by a brother of the principal stockholder of petitioner, Pioneer Motor Service, Inc., plus the additional fact that this particular brother was also an employee of the bankrupt at the time that the petition for adjudication was filed. The existence of these facts stirs the petitioner herein to label this as a fraudulent act and to the further assertion that the Bankruptcy Act is being used here as an instrument of fraud. There is no merit to this contention. Section 59 of the Bankruptcy Act provides:

"Who may file and dismiss petitions?*

b. Three or more creditors who have provable claims not contingent as to liability against a person amounting in the aggregate to $500.00 in excess of the value of any securities held by them,* may file a petition to have him adjudged a bankrupt;.*"

There can certainly be no dispute that the word creditor can embrace a brother, a corporation controlled by a brother, or an employee. At this point we would also like to point out that there were four (4) petitioning creditors, three who started the action originally and one who intervened at a later date, to wit: Herriott Trucking Company, Inc. We, therefore, have a sufficient number of creditors outside the corporation controlled by the brother that petitioner complains about. The conduct of the brother or the company he controlled is immaterial so long as the requirements of the Bankruptcy Act are met by the other creditors. The argument of fraud does not and cannot apply to them.

Finally, the fact that one of the petitioning creditors is controlled by a brother and an employee does not raise any evidence of fraud. There must be evidence of fraud presented in the record outside of these facts.

To summarize, a creditor just because he is related to the alleged bankrupt or is an employee is not guilty of fraud because he seeks to collect a debt due him through the orderly liquidation process of the Bankruptcy Court.

Stripped of all of its verbiage, petitioner seeks to invoke the jurisdiction of this Court to review the decision of the Court of Appeals solely on the theory that the Court of Appeals condoned an act of fraud and not

because that decision is contrary to basic bankruptcy rules as interpreted by the courts. Unfortunately for petitioner there is no evidence of fraud and, therefore, there cannot be any condonation of fraud.

(b)

THE OPINION OF THE COURT OF APPEALS DOES NOT PRESENT ANY QUESTIONS FOR REVIEW.

An examination of the first question presented for review by the petitioner in its brief reveals that petitioner is here, no doubt, referring to the so called sixth act of Bankruptcy which is a written admission by the debtor of his inability to pay his debts and his willingness to be adjudicated a bankrupt. (11 U.S.C.A. 21(A)6)

The decision of the Court of Appeals is based entirely on the third act of Bankruptcy. We refer this Honorable Court to the opinion of the Court of Appeals found in petitioner's brief, Appendix I, Pages 3A and 4A where the Court states:

> "We need not consider the several claimed acts of bankruptcy asserted by petitioning creditors which were disallowed by the referee. We shall examine the one act of bankruptcy found valid by the referee."

Section 3 of the Bankruptcy Act, 11 U.S.C.A. 21(a)(3) provides:

> Par. 21. Acts of bankruptcy (a) Acts of Bankruptcy by a person shall consist of his having * * * (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings or distraint and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property; * * *." (Emphasis added.)

It is undisputed that the Internal Revenue Service, having filed its lien on July 25, 1964, did levy on Motor's bank account on July 30, 1964 and collected approximately $800 on August 4, 1964 as a result of such seizure of Motor's property. It is further undisputed that Motor did not vacate or discharge such lien five days prior to the disposition of the bank account.

It is clear from the Bankruptcy Act quoted above that a lien obtained through distraint is an act of bankruptcy. It has been held that a seizure of property to enforce a lien, under the Internal Revenue Code, is a distraint within the meaning of the Act. Collier, Bankruptcy, 14th Ed., Vol. 1, Par. 3.308(6), pp. 470-471; *In Re: Timberline Lodge,* D.C. Ore., 139 F. Supp. 13, 15-17 (1955).

As *Timberline,* supra at 17, aptly quotes from Collier, supra at 471:

> "It is not the lien itself, nor the execution thereunder, which constitutes the act of bankruptcy. It is rather the failure on the part of the debtor to have the same vacated or discharged (1) at least five days before the date set for (the) sale or other disposition of the property, or (2) within thirty days after the creation of the lien.
>
> We conclude, therefore, that the referee did not err in so finding this to be an act of bankruptcy within the purview of the Act."

In our additional statement of facts, we point out that on July 25, 1964 the United States of America Internal Revenue Service recorded a tax lien in the Recorder's Office of Rock Island County, Illinois for a highway use tax in the amount of $3,251.45. On July 30 the Internal Revenue Service levied upon the bank account of Pioneer Motor Service, Inc. On August 4, 1964 as a result of said

levy, the Internal Revenue Service collected $797.45 from the account of Pioneer Motor Service, Inc.

We further point out to this Court that there is no evidence from petitioner that the brother that the petitioner is complaining about had anything to do with the distraint by the Internal Revenue Service of the account of petitioner. This lien was obtained by the Internal Revenue Service in accordance with its rules and regulations and there is no evidence or claim made by the petitioner that this brother urged, consented or participated in the activities of the Internal Revenue Service in carrying out the duty entrusted to it by the law.

There is more than sufficient evidence in the record which, incidentally, petitioner does not deny, that indicates that at this time the petitioner was insolvent.

In point two in its questions presented for review, petitioner argues that there are no bonafide creditors listed in the three petitioning creditors. The Court of Appeals, however, found that there were three petitioning creditors and an intervening fourth creditor. Petitioner's difficulty is that he refuses to accept the findings of fact made by the Court and, therefore, he still takes the position that there were no bonafide creditors.

This Court should not review a finding of fact made by the Court of Appeals where there is no indication that the finding was contrary to the great weight of the evidence.

The third question presented for review should also be disregarded by this Court as nowhere in the Bankruptcy Act is there any provision that provides that an offer to pay is grounds for dismissal of a bankruptcy

petition. Possibly an actual payment of all the debts would eliminate the necessity of further administration of a bankruptcy estate, but as long as there are unpaid creditors, there is a need for the Court sitting as a bankruptcy court to provide an orderly, fair liquidation and distribution of the assets of the estate and pay the claims in accordance with the bankruptcy law. Furthermore, there has never been even an offer to pay, though petitioner states such an offer has been made. For proof of this statement we call to this honorable Court's attention the statement made by Petitioner in question two of the questions presented for review. (See Petitioner brief, page 4). Petitioner states there that none of the three petitioning creditors were bonafide. His offer to pay only bonafide creditors must leave the claims of the petitioning creditors unpaid. In all the years that this matter has been pending, petitioner has not paid one claim.

As far as the fourth question presented for review by the petitioner, we have already pointed out that the relationship of the parties involved does not in itself raise an inference or presumption that fraud is present in the instant matter. Furthermore, we have already pointed out that there is no evidence cited from the record that would in any way indicate the existence of fraud. Lastly the motive of a petitioning creditor is immaterial and will not defeat an adjudication. (*In re National Motorship,* 7 Fed. Supp. 1001, Dist. Ct. S.D. New York 1934 and, *In re Automatic Typewriter,* 271 Fed. 1 (4) Cir. Ct. App. 2nd Cir., 1921.)

CONCLUSION.

There is no basis upon which to issue the Writ of Certiorari. There is no novel question before this Court. This case was decided on the so called third act of Bankruptcy which has been before this Court on a number of occasions. Finally, there is no inference or presumption of fraud or evidence of fraud present in the within matter.

For these reasons it is, therefore, earnestly urged that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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